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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SEONGSU KIM et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

WILSHIRE STATE BANK,

Real Party in Interest.

B219354

(Los Angeles County
Super. Ct. No. LC086199)

ORIGINAL PROCEEDING; Petition for writ of mandate. Richard A. Adler,
Judge. Writ Granted.

Caldwell Leslie & Proctor, Christopher G. Caldwell, Sandra L. Tholen and
Laurie C. Martindale for Petitioners.

No appearance for Respondent.

Lim, Ruger & Kim, Sam S. Oh, Marc J. Manason and Philip G. Grant for Real
Party in Interest.

* * * * *

Petitioners and defendants Seongsu Kim and Eun Kyung Kim (collectively, the Kims) seek a writ of mandate directing the trial court to set aside its order denying their motion to disqualify their former law firm, Lim, Ruger & Kim, LLP (Lim Ruger) from representing real party in interest and plaintiff Wilshire State Bank (Bank) in connection with the underlying case. Because there is a substantial relationship between Lim Ruger's prior representation of the Kims and Lim Ruger's current representation of the Bank, and because the modified substantial relationship rule is inapplicable under the circumstances of this case, we grant the petition.

FACTUAL AND PROCEDURAL HISTORY

In late 2006, the Kims retained Lim Ruger to advise them with respect to estate planning. Lim Ruger recommended various estate planning devices to achieve those goals, drafted various documents, including documents to establish three separate trusts, among them the Kim Family Trust dated January 22, 2007 (Trust). Lim Ruger recorded a deed transferring the family home into the Trust, advised the Kims on how to transfer almost a dozen categories of assets into the trusts, and informed the Kims that Lim Ruger would retain the originals of 19 of 20 documents at the firm.¹ The Kims paid Lim Ruger at least \$4,000.²

On July 16, 2009, Lim Ruger filed suit on behalf of the Bank against the Kims, individually and as trustees of the Trust, and Unicorp Beef, Inc. (Unicorp), the Kims' corporation. It was alleged that the Bank loaned \$7.5 million to Unicorp, and that Unicorp defaulted on the loan. The complaint also alleged that Seongsu Kim personally guaranteed the loan, and that the Trust executed a deed of trust in favor of the Bank,

¹ It appears Lim Ruger later transferred the original documents to Attorney Young Sun Park at the Kims' direction.

² The Kims claim they paid Lim Ruger \$8,000, while Lim Ruger claims the Kims paid the law firm a total of \$4,000. It is undisputed, however, that the Kims paid for legal services rendered by Lim Ruger. The amount is irrelevant to this decision.

pursuant to which the Trust pledged the Kims' family home as additional security for the note.

The Bank sought the appointment of a receiver to take possession of all personal property assets of Unicorp,³ a court order for the sale of all Unicorp's assets, and an order finding Seongsu Kim personally liable for any deficiencies that remain.⁴ The Bank also sought to foreclose on the Kims' family home--deeded to the Trust--and apply the proceeds of the sale to the amount it claims is due on the note.

In early August 2009, Christopher G. Caldwell, the Kims' current attorney, telephoned Sam S. Oh, a partner at Lim Ruger, to inform him that Lim Ruger had a conflict of interest that precluded the firm from representing the Bank in the underlying action. Mr. Oh responded that he was unaware that Lim Ruger had previously represented the Kims. A few days later, Mr. Oh took the position that Lim Ruger was not disqualified from representing the Bank in its lawsuit against the Kims.

On September 2, 2009, the Kims moved to disqualify Lim Ruger from representing the Bank on the basis that Lim Ruger previously had represented the Kims in connection with matters substantially related to the underlying action. The motion was supported by the declaration of Seongsu Kim with attached exhibits. The Kims claimed that they provided Lim Ruger with "confidential personal financial information and documents, including information relating to the nature and extent of [their] personal assets and liabilities as well as [their] business investments and other holdings." According to the Kims, they worked with two different Lim Ruger attorneys, Partner Jeannette Hahn and Associate Youngsun Park. The Kims further asserted that they never consented to Lim Ruger's representation of the Bank in the underlying action.

³ On July 23, 2009, the trial court appointed a receiver.

⁴ With respect to petitioner Eun Kyung Kim, the Bank claims it "seeks only liability against community property, not personal liability."

In opposition, Lim Ruger claimed the Kims' motion to disqualify Lim Ruger should be denied for two reasons: (1) there was no substantial relationship between its current representation of the Bank and its prior estate planning representation on behalf of the Kims, and (2) even if a substantial relationship did exist, disqualification was not proper because the only attorneys who actually performed services on behalf of the Kims were no longer employed with the firm, and the firm's remaining attorneys did not receive confidential information material to the current representation. Although Lim Ruger claimed it no longer had the Kim file, because it was picked up by Attorney Park at the Kims' direction, Lim Ruger admitted that it had "electronic documents pertaining to the estate planning matter on its computer system," which were drafted by Lim Ruger's estate planning department.

The trial court concluded that the Kims had failed to make an "evidentiary showing that any past work provided by [Lim Ruger] to [the Kims] would show a substantial relationship between this action and any past work provided." According to the court, the Kims should have produced a privilege log showing any documents that were in Lim Ruger's possession that the Kims claimed were privileged. The court held that "[s]imply knowing that [the Kims] have assets (which would have been revealed during discovery) does not go to the issue in this case. [The Kims] would need to show that [the Bank] had confidential information that was used by [Lim Ruger] or could use information from the estate plan to the benefit of [the Bank] as against [the Kims]."

The court, concluding that any relationship the Kims had with Lim Ruger "is attenuated by the fact that none of the attorneys [they] worked with continue to work for [Lim Ruger]," then applied the modified substantial relationship test. After conducting a fact-based inquiry into whether confidential information was actually exchanged between the attorneys who performed services on behalf of the Kims and thereafter left the firm and the attorneys who remained with Lim Ruger, the court held that there was "no indication that any information was used in drafting the [Bank's] Complaint or that any former attorney passed on any information before leaving" Lim Ruger.

Based on these findings, the trial court denied the Kims' disqualification motion, and this petition followed.

CONTENTION

The Kims contend the trial court abused its discretion in denying their motion to disqualify Lim Ruger from representing the Bank in the underlying action.

DISCUSSION

A. Standard of Review

“Generally, a trial court’s decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court’s express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court’s factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court’s discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court’s exercise of discretion. [Citation.]” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144 (*Speedee Oil*).)

B. Disqualification Principles

“A court’s authority to disqualify an attorney derives from its inherent power to control in furtherance of justice the conduct of its ministerial officers and the integrity of the proceedings before it. [Citations.]” (*Med-Trans Corp. Inc. v. City of California City* (2007) 156 Cal.App.4th 655, 663 (*Med-Trans*).)

In considering whether to grant a motion to disqualify a law firm, “[t]he court must weigh the combined effect of a party’s right to counsel of choice, an attorney’s interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system

requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest. [Citations.]” (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 562-563.) “Ultimately, disqualification motions involve a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]” (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.)

An attorney may not do anything which will injuriously affect a former client in any matter in which he formerly represented him. (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155.) Nor may an attorney “at any time use against his former client knowledge or information acquired by virtue of the previous relationship.” (*Ibid.*) “The purpose of the rule is to protect both confidential communications and the enduring confidential relationship between attorney and client.” (*In re Marriage of Zimmerman, supra*, 16 Cal.App.4th at p. 562.)

“In order to protect the confidential nature of the attorney-client relationship from conflicts of interest, the State Bar Rules of Professional Conduct, rule 3-310(E) . . . provides that an attorney may not, ‘without the informed written consent of the . . . former client, accept employment adverse to the . . . former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.’” (*Med-Trans, supra*, 156 Cal.App.4th at p. 664.)

The instant case involves alleged successive representation of clients whose interests are claimed to be adverse. In such cases, “a party may obtain the disqualification of an attorney by establishing that the targeted attorney (1) has actual knowledge of material confidential information or (2) is presumed to have acquired confidential information because of the relationship between the prior representation and the current representation.” (*Faughn v. Perez* (2006) 145 Cal.App.4th 592, 603.)

“Where the potential conflict is one that arises from the *successive* representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*. Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a ‘*substantial relationship*’ between the subjects of the antecedent and current representations. [¶] The ‘substantial relationship’ test mediates between two interests that are in tension in such a context--the freedom of the subsequent client to counsel of choice, on the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation, on the other. Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney’s representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm. [Citations.]” (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283-284.) The party moving for disqualification has the burden of proving the existence of such a substantial relationship. (See *Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 813.)

The presumption described above may not be rebutted “by declarations of self-interested parties” because “the rebuttal evidence that would inevitably be put forward . . . would raise a strong sense of impropriety,” placing client confidences at risk and undermining the public’s trust in the integrity of the bar. (*Elan Transdermal v. Cygnus Therapeutic Systems* (N.D. Cal. 1992) 809 F.Supp. 1383, 1388, 1390 [holding that the knowledge of the law firm’s former attorneys is imputed to those attorneys who were also working at the law firm during the period of its representation of the former client].)

C. Analysis

Applying the above principles to the facts of this case, we conclude the trial court erred in finding that the Kims failed to show that Lim Ruger's prior representation of them was substantially related to Lim Ruger's current representation of the Bank.

The trial court concluded that the Kims were required to do more than state that confidential information had been imparted to Lim Ruger. According to the trial court, the Kims "would need to show that [the Bank] had confidential information that was used by [Lim Ruger] or could use information from the estate plan to the benefit of [the Bank] as against [the Kims]." The court held that the Kims could make such a showing by producing a privilege log to show that Lim Ruger had possession of privileged information/documents. The Kims had no burden to provide the specific information sought by the trial court.

Although there have been various descriptions of the substantial relationship test, successive representations generally "will be substantially related 'when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.' [Citation.]" (*Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 679.) Alternatively stated, there is a substantial relationship between a counsel's successive representations if "'there is a substantial risk that [the present representation] will *involve the use of information acquired in the course of* [the prior representation], unless that information has become generally known.' [Citation.]" (*Farris*, at p. 680.)

In the course of its representation of the Kims, Lim Ruger provided the Kims with estate planning advice; recommended certain estate planning devices, established trusts to protect the Kims' assets, transferred assets into the Trust, and recorded the deed transferring the Kims' family residence to the Trust. Lim Ruger has now filed suit against the Kims, individually and as trustees of the Trust, and Unicorp, one of the assets owned by the Kims. Lim Ruger, on behalf of the Bank, is seeking to recover from the

Kims their personal assets and seeking to foreclose on the Kims' family home. The personal and financial information obtained by Lim Ruger from the Kims is relevant to collecting any judgment Lim Ruger may obtain against the Kims, and will materially advance the Bank's position in the current representation.

Under the foregoing circumstances, it was sufficient for the Kims to describe the kind of services provided by Lim Ruger, and to state, generally, that confidential information was imparted. It is difficult to imagine how estate planning services could be performed without a law firm having access to a client's confidential personal and financial information. The fact that the client thereafter provides some, or all, of that confidential information to a bank, that, in turn, sues the client, does not make the confidential information generally known. Nor does the fact that the client's confidential information may be discoverable in a later lawsuit excuse a law firm from its continuing duty of confidentiality.

There is a substantial relationship between Lim Ruger's prior representation of the Kims and Lim Ruger's current representation of the Bank. This being so, it is presumed that Lim Ruger had access to confidential information in the course of its representation of the Kims. As such, the disqualification of any attorneys who actually performed the work for the Kims is mandatory. And, the disqualification extends vicariously to Lim Ruger. (*Flatt v. Superior Court*, *supra*, 9 Cal.4th at pp. 283-284.)

While we recognize the Bank's interest in maintaining its current counsel, such interest "must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]" (*Speedee Oil*, *supra*, 20 Cal.4th at p. 1145.) To allow Lim Ruger to continue to represent the Bank would unfairly disadvantage the Kims.

D. The Modified Substantial Relationship Test Is Inapplicable under the Circumstances of This Case

The trial court found that any relationship the Kims had with Lim Ruger was "attenuated by the fact that none of the attorneys [the Kims] worked with continue to work for" Lim Ruger. Based on this finding, the trial court applied the modified substantial relationship test, and conducted a fact-based inquiry into whether confidential

information was imparted by the attorneys who performed the estate planning services for the Kims, and later left the firm, to attorneys who remained at Lim Ruger. After concluding that there was “no indication that any information was used in drafting the [Bank’s] Complaint or that any former attorney passed on any information before leaving” Lim Ruger, the court denied the Kims’ motion to disqualify the Bank’s law firm. This was error for at least two reasons.

First, as noted above, a substantial relationship exists between Lim Ruger’s prior representation of the Kims and Lim Ruger’s current representation of the Bank. Under these circumstances, the modified relationship test is inapplicable. (See *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1337-1341, *Ochoa v. Fordel, Inc.* (2007) 146 Cal.App.4th 898, 907-909 [modified substantial relationship test applies in situations where the former attorney-client relationship was peripheral or attenuated, rather than direct and personal].)

Second, this is not the kind of “firm switching attorney” case that calls for application of the modified substantial relationship test. The Kims hired the law firm of Lim Ruger to perform estate planning tasks and to render financial, tax and other advice; not the individual lawyers who actually performed the estate planning services and rendered the advice. The fact that the attorneys who provided the legal services to the Kims left the firm after the Kims’ estate planning was finalized is irrelevant. The knowledge that these “firm switching attorneys” acquired from the Kims was imputed to all members of Lim Ruger, and remained imputed after the attorneys left the firm. (See *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 573; *Elan Transdermal v. Cygnus Therapeutic Systems, supra*, 809 F.Supp. 1390-1393.)

CONCLUSION

Because there is a substantial relationship between Lim Ruger’s prior representation of the Kims and Lim Ruger’s current representation of the Bank, and because the modified substantial relationship rule is inapplicable under the circumstances of this case, we grant the petition for writ of mandate. The trial court is directed to set aside its order denying petitioners’ motion to disqualify Lim Ruger and issue a new and

different order granting the motion. The temporary stay is vacated. Petitioners to recover the costs of these proceedings.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST